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IN THE

Supreme Court of the United States

October Term, 1958

No. [REDACTED] / 3

MAURICE E. TRAVIS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT**

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THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT .

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit, entered March 27, 1959.

Opinion Below

The oral opinion of the District Court for the District of Colorado is unreported, but appears in the record (R. 41).¹ The Court of Appeals affirmed the judgment of the District Court, without opinion.

Jurisdiction

The judgment of the Court of Appeals was made and entered on March 27, 1959 and appears in the Appendix to this Petition. On April 6, 1959, Mr. Justice Whittaker extended the time for filing a petition for writ of certiorari to and including May 26, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

¹ In addition to the certified record, nine copies of the record in the court below have been filed with this petition.

• Questions Presented

1. Whether a defendant, after conviction under 18 U. S. C. 1001, is entitled to a new trial under Rule 33 of the Federal Rules of Criminal Procedure on the basis of newly discovered evidence that one of the three prosecution witnesses had committed perjury in another criminal case in a Federal District Court a short time before and had given false information about himself to the F.B.I. which was subsequently furnished to defendant on the trial pursuant to the so-called "Jencks statute", 18 U. S. C. (Supp. V) 3500.

2. Whether the District Court abused its discretion in denying petitioner a hearing on the motion for a new trial.

• Statutes Involved

18 U. S. C. 1001, 62 Stat. 749, provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years or both."

29 U. S. C. 159(h), 61 Stat. 143, 146, provides:

"No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously

or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional method. The provisions of sections 286, 287, 1001, 1022 and 1023 of Title 18 shall be applicable in respect to such affidavit."

Insofar as relevant, Rule 33 of the Federal Rules of Criminal Procedure provides:

"The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. * * *"

Statement of the Case

Petitioner had been convicted on February 5, 1958 on the four counts of an indictment charging him with violating 18 U. S. C. 1001 for filing false affidavits under Section 9(h) of the Taft-Hartley Act, 29 U. S. C. 159(h). Petitioner was convicted for denying in his affidavits in 1951 and 1952 that he was a member of, or affiliated with, the Communist Party. He was sentenced to imprisonment for eight years and fined \$8,000. His appeal from the conviction is still pending in the Court of Appeals (No. 5879), having been argued on November 17, 1958 (R. 10-11).

On the trial under the indictment, one Fred Leonard Gardner was one of the three prosecution witnesses against petitioner. The allegation in the motion for a new trial that Gardner's testimony was essential to support the judg-

ment of conviction on each of the four counts (R. 2) was not disputed in the courts below by the government.

In January, 1958, two weeks before he testified against petitioner, Gardner had testified for the prosecution on the trial in *United States v. West, et al.* in the United States District Court for the Northern District of Ohio, Eastern Division (No. 22230), a case in which the defendants were charged under 18 U. S. C. 371 for conspiring to file false affidavits under Section 9(h) of Taft-Hartley (R. 2).

On October 16, 1958, the defendants in the *West* case filed a motion for a new trial under Rule 33 based on newly discovered evidence that Gardner's testimony on the trial in that case that he had never been in the Armed Forces was false in that he had been in the Army in the 1920's and had deserted in 1926 (R. 3).

Petitioner's motion for a new trial or, in the alternative, for a hearing on the motion (R. 2), was filed on October 17, 1958 and, after alleging the above facts, alleged that the newly discovered evidence relating to Gardner's Army record also showed that Gardner had given false information to the F. B. I., later furnished to petitioner on the trial under 18 U. S. C. 3500, about his lack of military service and his desertion, about his age, and about his employment and his places of residence during the period from 1925 to 1929 (R. 4). In the course of the argument on the motion in the District Court, the motion was supplemented by allegations that Gardner had also lied to the F. B. I. about his employment and his places of residence in the early 1930's (R. 8-9, 14-18).

On the argument in the District Court, apparently in answer to the allegation in the motion that it was the duty of the government to disclose whether any agents or attorneys of the Department of Justice had had knowledge of Gardner's perjury and false statements (R. 5), the prosecutor submitted a written "statement" denying any such knowledge (R. 7).

Insofar as Gardner gave false information to the F. B. I., he may himself have been guilty of violating the false statement statute, under which petitioner was charged and convicted (R. 4).

The newly discovered evidence about Gardner must also be evaluated in the light of the nature of his testimony against petitioner on the trial.² Gardner testified about two conversations he had had with petitioner, the first more than six years earlier and the other more than four and a half years earlier. The first conversation, in the fall of 1951, purported to show, by petitioner's own statements to Gardner, that petitioner's public resignation from the Communist Party in August, 1949, was insincere and that he still regarded himself as a member of the Party. The second conversation, in June, 1953, purported to show that petitioner was familiar with the inner-Party activities of his union associates in Idaho and that he had Party relationships with them.

Thus, Gardner's testimony against petitioner, given in January, 1958, related to extrajudicial oral admissions made long before the testimony was given and suffers from the inherent weakness of such evidence.

The new evidence about Gardner's unreliability must also be viewed in the light of his inability or unwillingness to give accurate or truthful answers about minor or routine matters in his life, as revealed by his testimony under cross-examination on petitioner's trial. Thus, he testified that he was born in 1906, but admitted that he had sworn before a Senate Subcommittee in 1952 that he had been

² The matters relating to Gardner's testimony on the trial appear in the record on the appeal from the conviction. Inasmuch as the Court of Appeals affirmed the denial of the motion for a new trial while the main appeal was pending before it—as it still is—these matters are not contained in the record on this appeal. In this connection, the Court is referred to the suggestion, *infra*, p. 12, that the Court hold this petition in abeyance pending the decision of the Court of Appeals in that case.

born in 1907. (The newly discovered evidence indicates that when he originally enlisted in the Army, he said he was born in 1903). He thought he had testified in the *West* case the week before he was being cross-examined, but it was actually two weeks before. He testified that his schooling went to about the second grade, but he had told the F. B. I. that he had had about seven years of elementary education. His testimony before the Senate Subcommittee, in the *West* case, on the trial against petitioner, and the information he gave the F. B. I. about himself are also full of inconsistencies with respect to the dates and the nature of his different jobs during the period from 1930 to 1951.

Following the argument on the motion for a new trial, the District Court rendered an oral opinion, denying the motion and the alternative motion for a hearing (R. 41). The appropriate order was entered on November 3, 1958 (R. 10).

In the *West* case, although the District Court denied the motion for a new trial, it first conducted a hearing, lasting three and a half days. 170 F. Supp. 200, 205.

REASONS FOR GRANTING THE WRIT

I. The decision below, affirming the denial of the motion for a new trial, is in conflict with applicable decisions of this Court.

In *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, and *Mesarosh v. United States*, 352 U. S. 1, this Court considered the effect of new evidence relating to the unreliability or untrustworthiness of prosecution witnesses in so-called Communist cases. In the *Communist Party* case, upon allegations that three witnesses had committed perjury in other cases, the Court remanded the case to the Board for a hearing on their credibility.

In *Mesarosh*, upon motion of the Solicitor General that the case be remanded to the trial court for further proceedings because of untruthful testimony given before other tribunals by Mazzei, a government witness, this Court remanded for a new trial.

The *Communist Party* and *Mesarosh* cases required that the District Court grant petitioner a new trial. In its opinion denying the motion, the District Court incorrectly limited the decisions:

For purposes of its decision, the District Court assumed the correctness of the facts as alleged in the motion. However, the Court distinguished the case from the *Communist Party* and *Mesarosh* cases on the ground that the "taint" affected Gardner's testimony on a collateral matter—his credibility—rather than his testimony on material issues. (The same distinction was drawn by the District Judge in the *West* case in his opinion denying the motion for a new trial. 170 F. Supp. 200, 241.)

It is true that this case differs from the *Communist Party* and *Mesarosh* cases in this respect. However, "fastidious regard for the honor of the administration of justice" in the federal courts, *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, 124, would seem to require the application of the *Communist Party* and *Mesarosh* decisions to this case. Although the distinction between testimony relating to material issues and that relating to collateral issues is of course real, how far the distinction may be pressed and whether it is applicable at all depends upon the circumstances and the nature of the problem.

Suppose, for example, that it were shown that Gardner had *never* told the truth, or had *never* given consistent information, with respect to *any* routine circumstance in his history—when and where he was born; when and where he went to school; when and where he was married and

divorced; when, where, and for whom he had worked; when and where he had resided; and when he did military service, if at all. Would a jury believe such a man about two conversations with petitioner, one more than six years, the other more than four and a half years, before?

True, petitioner's showing was not this extensive. But enough was shown on the motion, especially when viewed in the light of the inconsistencies in Gardner's testimony about similar matters on the trial, to raise serious questions about his ability or willingness to tell the truth at all. In fact, the evidence is strong enough to raise doubts about Gardner's psychological stability similar to those expressed by the Solicitor General in the case of Mazzei. Gardner's instability may not be as apparent as Mazzei's. But a man who, over the years, has given inconsistent answers about his age, his schooling, his jobs, and his residences is not merely just another liar or just another man with a wavering memory. The problem would seem to be more deeply rooted.

Aside from the fact that the Trial Court's decision seems to be in conflict with two District Court cases which antedate the *Communist Party* and *Mesarosh* cases, *United States v. Senft*, 274 F. 62 (D. C. E. D. N. Y.) and *United States v. Segelman*, 83 F. Supp. 890 (D. C. W. D. Pa.), there are two respects in which this case is stronger than either the *Communist Party* or *Mesarosh* cases.

The first is that Gardner's falsehoods were committed in *this case*. The false information he gave the F.B.I. about his military service, his age, his employment, and his residences was, in turn, given to petitioner in the statements furnished pursuant to the "Jencks statute". Since, basically, the question about the newly discovered evidence is the effect it would have had on the jury if it had had the evidence before it in evaluating Gardner's credibility, it would seem that evidence that he lied in *this case* would have had a greater impact on the jury than evidence that

he lied in a different case. The fact that the evidence in this case relates to a so-called collateral issue, credibility, while the evidence in the *Communist Party* and *Mesarosh* cases went to the material issues, is an artificial distinction because, in any event, the evidence still bears on the collateral issue.

The fact that Gardner, by lying to the F.B.I., may have violated the very statute under which petitioner was charged and convicted, lends peculiar thrust to the new evidence. The jury would have been understandably hesitant to convict petitioner of lying to a federal agency on evidence given by a man who himself was shown to have lied to another federal agency and who, in addition, had uttered one of the same lies under oath only two weeks earlier in another federal court.

The second element which makes this case stronger than the *Communist Party* and *Mesarosh* cases is that what was concealed by one of Gardner's lies in this case and by his perjury in the *West* case was a desertion from the Army. In a Communist case, with its overtones of disloyalty, it is difficult to conceive of evidence more likely to discredit a prosecution witness with the jury than evidence such as this. In these times, every prosecution witness in a Communist case is a patriot, even a hero. The evidence of Gardner's desertion from the Army would have served to unmask the patriot and to reveal the scoundrel. Any normal jury would have been disenchanted to learn that the desertion in 1926 and the falsehoods in 1958 spanned this man's entire mature life.

If "the doing of justice" is to "be made so manifest that only irrational or peryerse claims of its disregard can be asserted", *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, 124, petitioner should have a new trial.

II. The decision below, affirming the denial of the alternative motion for a hearing, is in conflict with applicable decisions of this Court.

Even if petitioner was not entitled to a new trial without a hearing, he should not have been denied a new trial in the absence of one. The denial of a hearing is in conflict with the *Communist Party* and *Mesarosh* cases and with *Remmer v. United States*, 347 U. S. 227.

This Court remanded the *Communist Party* case to the Board for a hearing. In *Mesarosh*, where the Court remanded for a new trial, the dissenting Justices, in two separate opinions, argued only that there should have been a hearing as to the truthfulness and credibility of Mazzei; not a new trial. The cases in this Court, then, seem to require that the District Court should have ordered a hearing on the motion for a new trial.

It is difficult to understand why the government took a hearing on the motion for a new trial in the *West* case as a matter of course,³ but opposed a hearing in this case. In its brief below (pp. 1-2), the only argument made by the government in justification of its contradictory positions was that Gardner had been asked about his military service on cross-examination in the *West* case, but not in this case. Aside from the fact that petitioner's attorneys, on the trial, had no reason to doubt the information in the F.B.I. report that Gardner had not had any military service and thus had no incentive to inquire into the matter, it is not easy to see how this circumstance bears on the propriety of a hearing. Even on the merits of the respective motions, it would be difficult enough to understand an argument that Gardner's violation of the perjury statute in the *West* case was somehow more serious than his violation of the false statement

³ Attorneys for the *West* defendants have advised petitioner's attorney to this effect. There was no dispute about the matter in the courts below.

statute in this case. But it is altogether impossible to comprehend how this difference would justify a hearing in the *West* case but not in this. In one sense, the responsibility of the prosecution in this case was heavier than in the *West* case. In the *West* case, the defense was not furnished with the false data which Gardner had given to the F.B.I. Gardner's falsehood was uttered on the witness stand. In this case, the prosecution, however unwittingly, was the belt for the transmission of Gardner's falsehoods.

In any event, the District Court denied a hearing on the ground that a hearing could not serve to bring the motion, on the merits, within the *Communist Party* and *Mesarosh* cases (R. 48-49). However, this view ignored the allegation in the motion for a new trial that the newly discovered evidence also gave rise to the belief that Gardner must have lied about many other matters on many other occasions since his desertion from the Army in 1926 (R. 5). It also ignored the allegation in the motion that it was the duty of the government to advise the Court and petitioner whether any agents of the Department of Justice had had knowledge of Gardner's desertion and of his falsehoods (*ibid.*). A hearing would have served to explore both areas.

It must of course be conceded that most motions for a new trial can be, and are, decided without hearing and that the discretion of the trial court in this respect is indeed a wide one. But where, as here, there were matters which a hearing could reasonably be expected to develop, cf. *Remmer v. United States*, 347 U. S. 227, it was an abuse of discretion for the District Court to deny a hearing.

Conclusion

For the foregoing reasons, this petition should be granted.

However, petitioner respectfully suggests that the Court defer action on the petition pending a decision by the Court of Appeals on the appeal from the conviction, *Travis v. United States*, No. 5879. If the judgment of conviction is reversed by the Court of Appeals and the government does not file a petition for writ of certiorari, this petition would become moot. If, however, the judgment of conviction is affirmed, petitioner would in normal course file a petition for writ of certiorari in that case also. Especially since this petition by necessity refers to certain matters in the record in the main case but not in the record in this case, it would seem appropriate for the Court to defer action on this petition until the Court of Appeals decides the main case.

The Solicitor General has advised petitioner's attorney that the government will interpose no objection to the foregoing suggestion.

The Court may also wish to consider two additional circumstances which bear on this suggestion. The first is that, on April 29, 1959, petitioner filed in the District Court a second motion for a new trial under Rule 33, based on newly discovered evidence contained in Gardner's testimony on the hearing on the motion for a new trial in the *West* case. Petitioner's attorney has been notified by the Clerk of the District Court that argument on the motion will probably not be heard until July, 1959.

The second circumstance concerns the status of the *West* case. Petitioner's attorney has been advised by the attorneys for the defendants in that case that the appeal from the denial of the motion for a new trial has been consolidated with the appeal from the judgment of conviction

and is pending in the Court of Appeals for the Sixth Circuit, Nos. 13,672-13,678, and that the time for appellants to file briefs has been extended to 30 days after this Court decides the cases pending before it relating to the "Jencks statute" and to the production of grand jury testimony, or until 30 days after the end of this Term of the Court, whichever is sooner.

This Court, then, may wish to defer action on this petition until all three of the foregoing matters are determined by the lower courts.

Respectfully submitted,

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** Lev, Wool and Rubin v. United States, Nos. 435-437; Rosenberg v. United States, No. 451; Palermo v. United States, No. 471; Pittsburgh Plate Glass Co. v. United States, No. 489; Galex Mirror Co. v. United States, No. 491.*

Incidentally, petitioner's appeal from his conviction also raises issues, among others, relating to the "Jencks statute" and the refusal of the District Court to order the production of the grand jury testimony of Gardner and the other two prosecution witnesses.

APPENDIX**(Judgment)****UNITED STATES COURT OF APPEALS****FOR THE TENTH CIRCUIT**

No. 6060

MAURICE E. TRAVIS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Fifth Day, March Term, Friday, March 27th, 1959.

Before Honorable Sam G. Bratton. Chief Judge and
Honorable Alfred P. Murrah and Honorable David T.
Lewis, Circuit Judges.

This cause came to be heard on the transcript of the
record from the United States District Court for the Dis-
trict of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged
by this court that the judgment of the said district court
in this cause be and the same is hereby affirmed, without
written opinion.